INDEX.

Summary of Judgment.

I.

PAGE

The petitioner failed to raise any constitutional issue in the state courts, and is therefore precluded from seeking a review in this court 1-9

The construction of a statute does not raise a constitutional issue 2

The law in Illinois and in this court is well settled that one waives all constitutional questions by appealing from a trial court's decision to the Appellate Court rather than to the Supreme Court 2-4

The contentions raised in the present petition are identical with those raised in the case of The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, D., et al. v. City of Chicago, et al., 320 U. S. 737, 88 L. ed. 437, in which this court denied a petition for writ of certiorari..... 4-8

II.

In essence the petition for certiorari charges that the judgments of the state courts are erroneous. Federal Constitution offers no protection against erroneous judicial action even if the charge were well grounded 9-11

The Federal Constitution offers no guarantee of correct decisions 9

This case is on all fours with the case of The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al. v. City of Chicago, et al., 329 U. S. 733, 91 L. Ed. 633, where this court denied a petition for writ of certiorari..... 10

The petitioner has had full and fair hearings in the state courts and the judgments therein have been in conformity with reason and settled law 11

III.

The claim of the petitioner is solely for interest and therefore barred by the statute of limitations because suit was not started within five years after payment of the principal of the judgment 12-17

This case presents a simple situation of a suit brought for interest upon a judgment more than five years after the principal had been paid in full. The law has been thoroughly established in Illinois that the five year statute of limitations applies in this situation 12

Whatever rights the petitioner may claim under Section 42a of the Local Improvement Act, the Supreme Court of Illinois in Cohen v. City of Chicago, 377 Ill. 221, has held were waived by the signing of the vouchers and receipts clearly showing that payment was made and accepted in full of the condemnation award. The Cohen case is also authority for the proposition that the claim of the petitioner is clearly one for interest under Section 3 of the Interest Act (1947 Ill. Rev. Stat., chap. 74, par. 3) and is therefore barred by the five-year statute of limitations.. 17

Conclusion 18

Table of Cases.

Andrews v. Swartz, 156 U. S. 272 10
Ballard v. Hunter, 204 U. S. 241, 258 9
Blakeslee's Warehouses v. City of Chicago, 369 Ill. 480 11
Boal v. City of Chicago, 330 Ill. App. 614 (Abst. Opinion) 11, 13
Central U. Teleph. Co. v. Edwardsville, 70 L. Ed. 229, 269 U. S. 190, 46 Sup. Ct. 90 ..... 2, 3
Chapralis v. City of Chicago, 326 Ill. App. 554 .....11, 13
Chicago L. Ins. Co. v. Cherry, 244 U. S. 25, 30 9
Cohen v. City of Chicago, 377 Ill. 221 .....11, 13, 15
Cooper v. Palais Royal Theatre Co., 320 Ill. 44, 49.... 2
Dean v. Board of Education, 386 Ill. 156, 157 2
Guaranty Mortgage & Security Company, et al. v. City of Chicago, 328 Ill. App. 276 13
McKane v. Durston, 153 U. S. 684, 687 10
Neblett v. Carpenter, 83 L. Ed. 182, 305 U. S. 297, 59 S. Ct. 170 2
Oliver v. Retirement Board, 375 Ill. 641, 642 2
Parker v. Illinois, 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708 ..... 2, 4
People v. Smart, 333 Ill. 135 14
The People v. Richardson, 397 Ill. 84 2
The People v. Rosenthal, 370 Ill. 244, 247 2
The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al. v. City of Chicago, et al., 320 U. S. 737, 88 L. Ed. 437.....4, 18
The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al. v. City of Chicago, et al., 329 U. S. 733, 91 L. Ed. 633.....10, 18
Trust Company of Chicago v. City of Chicago, 327 Ill. App. 222 .....11, 13, 14
Wilson v. Cook, 90 L. Ed. 793, 327 U. S. 474 2

Statutes Cited.

Local Improvement Act (1947 Ill. Rev. Stats., chapter 24, paragraph 84-42a) 2
Interest Act (1947 Ill. Rev. Stat., Chap. 74, par. 3).... 17

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 243

ALTHEA J. CUNNINGHAM,

Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The respondent, City of Chicago, a municipal corporation, opposes the position for certiorari on the following grounds:

I.

The petitioner failed to raise any constitutional issue in the state courts, and is therefore precluded from seeking a review in this court.

The petitioner, in her original complaint and in her briefs in the Appellate and Supreme Courts of Illinois,

as well as in her petition for certiorari to this court, has never contended that Section 42a of the Local Improvement Act (1947 Ill. Rev. Stats., chapter 24, paragraph 84-42a) was unconstitutional. On the contrary, it has always been her position that the Act is constitutional but that it provides for the creation of a trust fund to pay the unpaid balance of interest when the principal of a condemnation judgment has been paid in full. The issue raised by the petitioner in all the State courts was the construction, rather than the constitutionality, of the Act. This court and the Illinois Supreme Court have consistently held that the construction of a statute does not raise a constitutional issue.

Wilson v. *Cook*, 90 L. Ed. 793, 327 U. S. 474;
Neblett v. *Carpenter*, 83 L. Ed. 182, 305 U. S. 297, 59 S. Ct. 170;
Cooper v. *Palais Royal Theatre Co.*, 320 Ill. 44, 49;
Oliver v. *Retirement Board*, 375 Ill. 641, 642;
Dean v. *Board of Education*, 386 Ill. 156, 157.

Furthermore, the petitioner appealed to the Appellate Court of Illinois from the decision of the trial court rather than to the Supreme Court of Illinois. The law in Illinois and in this court is well settled that one waives all constitutional questions by appealing from a trial court's decision to the Appellate rather than to the Supreme Court.

The People v. *Richardson*, 397 Ill. 84;
The People v. *Rosenthal*, 370 Ill. 244, 247;
Central U. Teleph. Co. v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190; 46 S. Ct. 90;
Parker v. *Illinois*, 92 L. Ed. 886, 333 U. S. 571; 68 S. Ct. 708.

In *Central U. Teleph. Co.* v. *Edwardsville*, 70 L. Ed. 229, 269 U. S. 190, 46 Sup. Ct. 90, the telephone company filed a writ of error in this court to review a judgment of the Supreme Court of the State of Illinois which declined to hear the constitutional questions presented on the ground that they had been waived by the telephone company appealing to the Appellate Court from an adverse decision entered by the Circuit Court of Madison County, Illinois. This court, in dismissing the writ of error, construed the statute of the State of Illinois which provided that all appeals involving a constitutional question should be taken directly to the Supreme Court of Illinois, and said (70 L. Ed. p. 231):

> "The construction of this statute has been uniformly held to be that where a question involves the Constitution, it must be taken on error or appeal to the supreme court, and that if it be taken to the appellate court on other grounds, the party taking the appeal or suing out the writ of error shall be held to have waived the constitutional questions. *Indiana Millers' Mut. F. Ins. Co.* v. *People*, 170 Ill. 474, 49 N. E. 364; *Robson* v. *Doyle*, 191 Ill. 566, 61 N. E. 435; *Case* v. *Sullivan*, 222 Ill. 56, 78 N. E. 37; *Poe* v. *Ulrey*, 233 Ill. 56, 84 N. E. 46; *R. Haas Electric & Mfg. Co.* v. *Springfield Amusement Park Co.*, 236 Ill. 452, 23 L. R. A. (N. S.) 620, 127 Am. St. Rep. 297, 86 N. E. 248; *Scott* v. *Artman*, 237 Ill. 394, 86 N. E. 595; *Vermilion Special Drainage Dist.* v. *Shockey*, 238 Ill. 237, 87 N. E. 335. * * *"

This court held that the statute was fair, and a litigant who appealed to the Appellate Court of Illinois waived all Federal and state constitutional questions, saying (70 L. Ed. p. 231):

> "It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, Federal or state, he may take the case directly to the supreme court and have that question decided together with all the

> other questions in the case, and then if the Federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the appellate court, he may have the nonconstitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court."

The decision in the *Edwardsville* case was followed and approved in *Parker* v. *Illinois,* 92 L. Ed. 886, 333 U. S. 571, 68 S. Ct. 708, where the court said (92 L. Ed., 888-889):

> "The Court said in the Edwardsville Case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court . 269 U. S. pp. 194, 195, 70 L. ed. 231, 46 S. Ct. 90. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed."

Here the petitioner appealed to the Appellate Court of Illinois from the judgment of the trial court (Tr. 33-34). By so doing she was waived her right to raise any constitutional objections.

Surprisingly, the contentions raised in the present petition are identical with those raised in the case of *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.* v. *City of Chicago, et al.*, 320 U. S. 737, 88 L. Ed. 437, in which this court denied a petition for writ of certiorari. In the *Trust*

Company case the petitioners stated their theory of the case to be (Petition for Writ of Certiorari, page 18):

> "Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with interest has been made to the property owner. *Finn* v. *Wetmore*, 212 Ill. App. 550 at 553 and 554 and cases there cited."

In the present petition the petitioner states her theory of the case to be (Page 12):

> "Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with

interest has been made to the property owner. *Finn* v. *Wetmore,* 212 Ill. App. 550 at 553 and 554 and cases there cited. (See pages 44-45, below.)"

In the *Trust Company* case the petitioners set forth their contention as follows: (Petition for Writ of Certiorari, page 3):

"Your petitioners urge that the Supreme Court of Illinois by its order without any opinion, abdicated its constitutional duty to your petitioners to review and pass upon the constitutional and federal questions presented by this record to the Circuit Court of Cook County and to the Supreme Court of Illinois. That in so doing said Court arbitrarily seeks to change the inalienable and fundamental personal and property rights of your petitioners under the bill of rights of the Constitution of the State of Illinois and the United States, into mere matters at the grace and permission of the Supreme Court of Illinois (Tr. 74-76). Also to change the obligatory jurisdiction of the Supreme Court of Illinois into merely discretionary jurisdiction. Thereby your petitioners were denied an obligatory hearing as to their vested rights, their contractual rights, and equal application of law, contrary to the fifth and fourteenth amendments of the Constitution of the United States. *People* v. *Kelly,* 361 Ill. 54 at 59, 60."

In the present petition the petitioner sets forth her contention as follows (Page 13):

"Your petitioner urges that said Appellate Court by its order and Opinion, and also the Circuit Court of Cook County and the Supreme Court of Illinois by orders without any opinion, abdicated constitutional duty to your petitioner, and refused just remedy and failed to review and pass upon the constitutional and federal questions presented by this record to all said Courts of Illinois.

"That in so doing said Courts arbitrarily seek to change the fundamental personal and property rights of your petitioner under the bill of rights of the Constitutions of the State of Illinois and the United

States, into mere matters at the grace and permission of the Courts of Illinois. Also to change the obligatory jurisdiction of the Courts of Illinois into merely discretionary jurisdiction. Thereby your petitioner was denied an obligatory hearing as to her vested rights, her contractual rights, and equal application of law, contrary to Article VI, paragraph 2 and the fifth and fourteenth amendments to the Constitution of the United States, and contrary to due process of law. *People* v. *Kelly*, 361 Ill. 54 at 59, 60; *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208 at 212. (See page 30 below.) "

Evidence of the fact that Section 42a of the Local Improvement Act and the contentions of the petitioner were before this court in the *Trust Company* case is shown by the statement of the Appellate Court of Illinois in the case of *Boal* v. *City of Chicago*, 330 Ill. App. 614 (Abst. Opinion), cited with approval by the Appellate Court in this case, where the court said (Tr. 38-39):

"Plaintiff contends that the statute of limitations does not apply to his claim because under Section 42a of the Local Improvement Act (ch. 24, par. 84, Ill. Rev. Stat. 1945), a direct trust is established for the benefit of the landowner whose property is taken for the improvement; that the instant case is based upon that section and that the point now raised by plaintiff has not been passed upon by the Appellate Courts nor the Supreme Court. Counsel for plaintiff state that in *Trust Co. of Chicago* v. *City of Chicago*, 327 Ill. App. 222, Section 42a 'was referred to by counsel merely *in argumento*,' but they contend that it was not involved in that case and '*was not relied upon by the appellant company.*' We have before us the briefs that were filed in that case, and while it is true that in the plaintiffs' brief they did not, apparently, rely upon Section 42a, we find that they were allowed to file, upon their request, 'Supplemental Citations and Suggestions,' which is a brief of thirty-six printed pages and we find therein that the plaintiffs cite Section 42a and contend that it establishes a 'special trust fund

applicable primarily to pay interest upon the condemnation awards which are charged specially by the statute upon the first installment,' when not promptly paid. 'Thereby the interest which accrues on first installment of special assessment is a permanent tax lien until paid, free from any and all statutes of limitation.' The argument made by the City in that case was practically the same as its argument upon the instant point in the case now before us. In *Trust Co. of Chicago* v. *City of Chicago* the opinion states: 'Under plaintiffs' theory a trust relationship existed between the parties, and the City of Chicago was therefore precluded from interposing the bar of the five-year statute of limitations,' and it was held, properly, we think, that 'plaintiffs' theory of a trust as set forth in their briefs is without merit.' The Supreme Court denied an appeal in that case. (391 Ill. 629.) * * * We conclude that the contention of plaintiff that Section 42a establishes a direct trust for the benefit of plaintiff in the instant proceeding is without the slightest merit; that no trust relationship exists between the City and plaintiff, and therefore the statute of limitations applies to the instant claim.''

It is apparent that counsel for the petitioner, in this case, is attempting to secure from this court a review of its decision, adverse to the petitioners in the *Trust Company* case, in which they advanced the identical contentions which are being advanced in this case. It is also apparent that the petitioner, by appealing to the Appellate Court of Illinois rather than directly to the Supreme Court of Illinois from the decision of the trial court, has waived all federal and state constitutional issues. Therefore, her petition for certiorari should be denied.

II.

In essence the petition for certiorari charges that the judgments of the state courts are erroneous. The federal constitution offers no protection against erroneous judicial action even if the charge were well grounded.

The petition for certiorari is rather difficult to follow, but a careful analysis discloses that essentially it charges that: (1) the trial court erred in deciding the case summarily upon a motion to dismiss the complaint because it was not filed within five years from the date when the cause of action accrued; (2) the Appellate Court erred in sustaining the judgment of the trial court; (3) the Supreme Court of Illinois erred in refusing to grant an appeal from the Appellate Court.

In short, the petitioner is complaining, not of want of due process but of alleged erroneous decisions of the State Courts in the course of the usual judicial process. The Federal Constitution offers no guarantee of correct decisions.

Ballard v. *Hunter,* 204 U. S. 241, 258.
Chicago L. Ins. Co. v. *Cherry,* 244 U. S. 25, 30.

Petitioner was given her day in court. She filed her complaint through counsel and was given full opportunity to resist the defendant's motion to dismiss the complaint. The trial court took the view that the undisputed allegations in the complaint disclose that it was not filed within the time required by statutory limitations. Dismissal for such reason is a time-honored procedure and no case can be found questioning the fact that it is due process. From a constitutional point of view it is immaterial whether the decision of the trial court is correct or erroneous.

It is also well settled that appeals are not essential to due process. *McKane* v. *Durston,* 153 U. S. 684, 687.

Even a statute which declares writs of error in criminal cases punishable by death to be writs of grace and not writs of right does not violate the Federal Constitution. *Andrews* v. *Swartz,* 156 U. S. 272.

In the Appellate Court of Illinois the petitioner was given a full hearing upon printed briefs filed by her and a written opinion was filed assigning reasons for the decision of the court. Pursuant to statute the petitioner filed her Petition for Leave to Appeal to the Supreme Court of Illinois but failed to convince the latter court that the Appellate Court had erred.

This case is on all fours with the case of *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.,* v. *City of Chicago, et al.,* 329 U. S. 733, 91 L. Ed. 633, where this court denied a petition for writ of certiorari. There the petitioners, one of whose attorneys, namely, Weightstill Woods, is also associate counsel in the present petition, filed a complaint in chancery contending that the City of Chicago was trustee for unpaid interest on condemnation judgments; that, therefore, the statute of limitations did not apply; and prayed for an accounting from the City of Chicago of all unpaid interest on condemnation judgments. The City filed a motion to dismiss, which was accompanied by affidavits and documents showing that the condemnation judgments were paid in full and that there only remained unpaid interest, which was barred by the statute of limitations. The trial court sustained the motion to dismiss and the plaintiffs appealed directly to the Supreme Court of Illinois. The Supreme Court of Illinois held that there was no constitutional question involved and transferred

the cause to the Appellate Court. The Appellate Court affirmed the judgment of the trial court. (*Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222). The petitioners filed a Petition for Leave to Appeal to the Supreme Court of Illinois, which petition was denied (391 Ill. 629). The petitioners then filed their petition for writ of certiorari in this court, which was denied.

In the petition for writ of certiorari to this court in the *Trust Company* case, the petitioners made the same contention as the petitioner is making in the present petition. Therefore, this court has previously passed on the same contention now made by the petitioner and refused to consider it.

The petitioner complains that the opinion of the Appellate Court was brusque. There was no need for a lengthy opinion. The real issue in the case had been repeatedly determined by the Illinois courts in *Blakeslee's Warehouses* v. *City of Chicago,* 369 Ill. 480; *Cohen* v. *City of Chicago,* 377 Ill. 221; *Chapralis* v. *City of Chicago,* 326 Ill. App. 554; *Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222; and *Boal* v. *City of Chicago, et al.,* 330 Ill. App. 614. It is not surprising that the Illinois courts refused to consider seriously the fantastic theory which the petitioner evolved in an attempt to circumvent the well settled rule laid down in the above cited cases that suit must be brought to recover interest within five years after the principal of a judgment has been paid in full.

The petitioner has had full and fair hearings in the state courts and the judgments therein have been in conformity with reason and settled law.

III.

The claim of the petitioner is solely for interest and therefor barred by the statute of limitations because suit was not started within five years after payment of the principal of the judgment.

This case presents the simple situation of a suit brought for interest upon a judgment more than five years after the principal has been paid in full. The law has been thoroughly established in Illinois that the five year statute of limitations applies in this situation.

On June 9, 1926 the petitioner recovered a judgment against the City of Chicago in a proceeding under the Local Improvement Act in the sum of $164,000 (Tr. 4). On September 10, 1927 the City of Chicago made a partial payment of $41,000 on said judgment, and on December 22, 1927 paid the balance of the principal of said judgment (Tr. 4, 26, 28). More than five years later, that is, on September 28, 1933, the original complaint in this suit was filed (Tr. 1). The complaint alleged that interest in the sum of $12,000 upon said judgment remained unpaid; that demands for the payment of the interest were made upon the City of Chicago and payment thereof was refused, and claim is made for said interest, together with interest thereon (Tr. 4, 5).

The voucher used to effect final payment of the judgment (Tr. 28) contained the following language:

> "• • • being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings."

On the back of the voucher (Tr. 29) appeared:

"Received of the City of Chicago full payment of the within account.

Althea Ione Cunningham
By Secor Cunningham."

Situations identical with that of the present case have been squarely passed upon by the courts of the State of Illinois. In each case it has been held that a simple question of application of payments is involved and that the language of the voucher issued by the City of Chicago in making payments upon condemnation judgments clearly establishes that the money paid was intended by the parties to be applied in full to the principal of the judgments. This application of payments leaves only interest unpaid and suit therefor must be filed within five years. (*Cohen* v. *City of Chicago,* 377 Ill. 221, 235-236; *Chapralis* v. *City of Chicago,* 326 Ill. App. 554; *Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222; *Guaranty Mortgage & Security Company, et al.,* v. *City of Chicago,* 328 Ill. App. 276.)

The petitioner completely ignores these decisions which conclusively dispose of the only real issue in the case. There is no distinction between the facts in this case and the facts in the four cases above cited. Petitioner argues that the City is a trustee for the benefit of the petitioner and that the statute of limitations does not run against a beneficiary of a trust. This argument was made in the briefs in *Trust Company of Chicago* v. *City of Chicago,* 327 Ill. App. 222, and was held untenable.

The Appellate Court held that the argument of the petitioner, to the effect that Section 42a of the Local Improvement Act created a trust fund for the benefit of the petitioner and therefore the claim is not barred by the statute of limitations, was presented to the Appellate Court in the cases of *Boal* v. *City of Chicago,* 330 Ill. App.

614, (Abst. Opinion) and in *Trust Co. of Chicago* v. *City of Chicago,* 327 Ill. App. 222 (Petition for Leave to Appeal to Illinois Supreme Court denied in 391 Ill. 629; certiorari denied 329 U. S. 733; 67 S. Ct. 95; 91 Law Ed. 633) and in each instance the court rejected the theory of the petitioner. In the *Boal* case the court, in an exhaustive and learned opinion, reviewed the law pertaining to claims for interest on condemnation judgments and the creation of express trusts under the Local Improvement Act, and held:

> "We conclude that the contention of plaintiff that Section 42a establishes a direct trust for the benefit of plaintiff in the instant proceeding is without the slightest merit; that no trust relationship exists between the City and the plaintiff, and therefore the statute of limitations applies to the instant claim.
>
> • • • • • •
>
> "In our judgment the new point raised by plaintiff's astute attorneys is but an effort to revitalize a dead claim.
>
> "This appeal is without merit and the judgment order of the Circuit Court of Cook County should be and it is affirmed."

The petitioner relies upon the case of *People* v. *Smart,* 333 Ill. 135, as authority for her contention that Section 42a of the Local Improvement Act creates a trust fund and therefore the statute of limitations does not apply. In the *Smart* case the village collector divided the special assessment into 10 installments. He neglected to deduct or credit to the first installment of the assessment the full amount of the condemnation award, but deducted the award from the 10 installments *pro rata.* The total amount awarded was less than the amount of the first installment of the assessment. The court stated the question on appeal to be as follows (p. 136):

> "The only question presented by this appeal is whether the award for property taken should be

> credited entirely to the first installment in each instance or credited *pro rata* to all the installments into which the assessment is divided."

The court held that Section 42a gives to municipalities, in a combined proceeding for the construction of an improvement and the taking of property therefor, the power to spread the cost of construction in 10 installments, however, the Act specifically requires the compensation for property to be applied to the first installment, and said (p. 138):

> "The fund for the payment of compensation having been thus provided for by the first installment, it would seem logically to follow that payment of awards of property should be made out of this fund. The crediting of an award *pro rata* against the entire ten installments is not such a compliance with the constitution as would warrant the taking of the property for public use prior to the time when the last installment became due and is manifestly against the intention of the legislature as expressed in the act."

The effect of the *Smart* decision was not that Section 42a created a trust fund for the payment of a condemnation award but rather that the condemnation award should be credited entirely to the first installment rather than prorating it against the entire 10 installments.

Section 42a of the Local Improvement Act and the *Smart* case were discussed in *Cohen* v. *City of Chicago,* 377 Ill. 221, where the facts were analogous to the facts in this case. There, condemnation awards were entered, and subsequent thereto the principal amounts of the awards were paid in full, but the interest remained unpaid. At the time of payment the parties accepted vouchers, identical to the vouchers in this case, reciting that the payments were "in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings."

On the back of each of these vouchers was printed a receipt which read, "Received of the City of Chicago full payment of the within account." The court in discussing Section 42a and the *Smart* case said (p. 230):

> "This court there construed said section 42a to mean that a fund must be provided for the payment of compensation for property taken and that said section did so provide by requiring such compensation to be paid out of the first installment. It was further held that the crediting of an award for property taken, *pro rata* against the entire ten installments, would not constitute a compliance with the constitution. This holding was based upon the proposition that property cannot be taken for public use, under the constitution unless, and until, the amount of the compensation has been fixed and paid. In this respect the questions involved in that case were not different from the question involved in this case, relating to section 16 of the act."

The court stated that as a general rule a payment is first credited to interest and the balance to principal but that such an application could be waived. The court held that the plaintiffs, by accepting payment and signing the vouchers and receipts hereinbefore set forth, clearly indicated that it was the intention of all parties that the payments made were intended and accepted, as full payment and liquidation of the judgments, leaving the interest unpaid, saying (p. 235):

> "On the face of the vouchers it clearly appears that the payments were for the balance of compensation due, which was the balance of the judgment, in each instance. The receipts on the back of the vouchers are, to the effect, that the payee, named on the face of the vouchers, and by whom the receipt is signed, has received full payment for the account described in the vouchers. * * * In our view, the record shows conclusively that it was the intention of all parties that the delivery of the vouchers and checks was in full

satisfaction of the amounts of compensation, as fixed by the judgments."

Whatever rights the petitioner may claim under Section 42a of the Local Improvement Act the court, in the *Cohen* case, has held were waived by the signing of the vouchers and receipts clearly showing that payment was made and accepted in full of the condemnation award. The *Cohen* case is also authority for the proposition that the claim of the petitioner is clearly one for interest under Section 3 of the Interest Act (1947 Ill. Rev. Stat., Chap. 74, par. 3).

It is apparent that the claim of the petitioner is one for interest barred by the 5 year statute of limitations and, therefore, the decision of the Appellate Court was proper.

Conclusion.

It is respectfully submitted that the issues raised by the petition for writ of certiorari are no longer debatable. This court has ruled adversely to the petitioners in the cases of *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.*, v. *City of Chicago, et al.*, 329 U. S. 733, 91 L. Ed. 633, and *The Trust Company of Chicago, Admr. of the Estate of Elizabeth Palmer Smith, Deceased, et al.*, v. *City of Chicago, et al.*, 320 U. S. 737, 88 L. Ed. 437, where identical issues were presented to this court. The decision of the Appellate Court of Illinois is in accordance with the law, and in no way conflicts with the Federal Constitution. The petitioner waived her right to raise any constitutional issue by appealing to the Appellate Court of Illinois. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

BENJAMIN S. ADAMOWSKI,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago 2, Illinois,
Attorney for Respondent.

L. LOUIS KARTON,
Head of Appeals and Review Division,

SYDNEY R. DREBIN,
Assistant Corporation Counsel,
Of Counsel.